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In The
Supreme Court of the United States
October Term, 1986

COMMONWEALTH OF PUERTO RICO,
Petitioner,

v.

TERRY E. BRANSTAD and the STATE OF IOWA,
RONALD CALDER, Intervenor,
Respondents.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF OF THE RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the well-established and uncontroversial rule in *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), which precludes a federal court from issuing a writ of mandamus to compel a governor of a sovereign state to extradite a citizen to another sovereign state pursuant to Article IV, section 2 of the Constitution, should be overruled at the request of the Commonwealth of Puerto Rico, a territory of the United States.

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ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT BRIEF OF THE RESPONDENTS

The respondents offer this joint brief urging affirmance of the decision of the Court of Appeals in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, section 2, cl. 2 of the Constitution of the United States, the Extradition Clause, provides that:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction over the Crime.

The Fugitive Felon Act, 18 U.S.C. § 1073, provides:

> Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, . . . under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, . . . which is a felony under the laws of the place from which the fugitive flees, . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both.
>
> Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, . . . and only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated.

The Extradition Act of 1793, 18 U.S.C. § 3182, provides:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which the person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

STATEMENT OF THE CASE

The Commonwealth of Puerto Rico seeks to conscript the federal courts in its political battle with two governors of Iowa over the extradition of Ronald Calder. Puerto Rican authorities charged Calder with murder and attempted murder in connection with an automobile accident which occurred in Aguadilla in January 1981. Two consecutive Iowa governors declined to extradite Calder to Puerto Rico to face the charges.

In 1983, Puerto Rico sought leave to file an original complaint with this Court. In support of its jurisdictional argument, the Commonwealth relied on *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861). In *Dennison*, this Court exercised its original jurisdiction to decide an extradition controversy between Kentucky and Ohio. The State of Iowa resisted, arguing *inter alia* that because the Commonwealth of Puerto Rico was a territory, it could not invoke this Court's original jurisdiction as a "controversy between two or more states." Article III, section 2. This Court denied leave to file the complaint. *Puerto Rico v. Iowa*, — U.S. — (1984), 52 U.S.L.W. 3509 (Jan. 9, 1984).

Puerto Rico then filed this action in Federal District Court for the Southern District of Iowa seeking a writ of mandamus to compel the Governor of Iowa, The Honorable Terry E. Branstad, to extradite Calder. Relying on *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861), the District Court dismissed the action. The United States Court of Appeals for the Eighth Circuit affirmed. *Commonwealth of Puerto Rico v. Branstad*, 787 F.2d 423 (8th Cir. 1986). Puerto Rico filed the instant

petition and this Court granted certiorari. 55 U.S.L.W. 3199 (Oct. 7, 1986).

SUMMARY OF ARGUMENT

In *Kentucky v. Dennison*, this Court held that a federal court could not issue a writ of mandamus compelling a state governor to extradite a fugitive to a sister state under the Extradition Clause of the Constitution. U.S. Const., Art. IV, sec. 2, cl. 2. While sweeping statements in *Dennison* to the effect that federal courts lacked the power to issue writs of mandamus compelling state officials to comply with federal law may appear overbroad today, the narrow holding in *Kentucky v. Dennison* in the unique constitutional context of the Extradition Clause remains sound.

The notion that the federal judiciary should decline to thrust itself into extradition disputes between sovereign states is supported by three related concepts. First, federal judicial review of a decision by a state governor not to force a citizen to face criminal proceedings in a sister state would be an unwarranted intrusion into the political process by the most nonpolitical branch of government. Second, federal judicial review of extradition decisions by state governors would offend notions of federalism and comity that are designed to ensure a smooth working relationship between the state and federal governments. Finally, federal judicial review of extradition decisions by state governors is improper and entirely unnecessary because the Congress is the appropriate body to develop mechanisms, if needed, to enforce the Extradition Clause.

The congressional power to enforce the Extradition Clause has not been dormant. Congress has exercised its enforcement powers through the Fugitive Felon Act, 18 U.S.C. § 1073, a narrowly crafted statute. Unhappy with the limited willingness of Congress and the federal executive branch to intervene in extradition matters, Puerto Rico seeks to expand federal involvement by asking this Court to abandon two centuries of judicial restraint in the extradition area. Such judicial activism is entirely unwarranted, particularly in light of the refusal of the political branches of the federal government to intervene aggressively through the federal criminal justice process in extradition disputes between states.

In the alternative, judicial determination of the role of federal courts in extradition matters is not required under the facts of this case. Puerto Rico is not a "state" under the Extradition Clause. As a result, even if this Court were inclined to reconsider *Kentucky v. Dennison*, it should not do so at the request of an entity that is not entitled to invoke the constitutional provision.

ARGUMENT

I. THE TRADITIONAL REFUSAL OF FEDERAL COURTS TO INTERVENE IN EXTRADITION DISPUTES IS SOUNDLY BASED ON JUDICIAL RESPECT FOR SOVEREIGN STATES AND THEIR POPULARLY ELECTED CHIEF EXECUTIVES IN CRIMINAL JUSTICE MATTERS AND UPON RECOGNITION OF THE PRIMARY ROLE OF CONGRESS IN RESOLVING DIFFICULTIES IN INTERSTATE RELATIONS.

The holding in *Kentucky v. Dennison*, if not its rationale, enjoys broad support in state and federal courts

and among the commentators.[1] The widespread acceptance of *Dennison* suggests that its principle of judicial restraint is not a "lone historical relic" to be tossed aside like poor Yorick's skull,[2] but rather is an established and deeply engrained part of our constitutional tradition.[3]

Generally, the presence of consensus around a legal principle is not the result of blind acceptance of tradition but rather a recognition of the validity of the policy rationale for the rule of law. In the context of *Dennison*, the holding has important policy underpinnings.[4] First, the judiciary has generally declined to second guess execu-

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[1] *See, e.g., Taylor v. Taintor*, 83 U.S. (16 Wall.) 366, 374 (1873); *Taylor v. State*, 405 So.2d 55, 55 (Ala. Cr. App. 1981); *South Dakota v. Brown*, 144 Cal.Rptr. 758, 576 P.2d 736, 476 (1978); *State v. Coughlin*, 90 Wash.2d 835, 838, 556 P.2d 1145, 1147 (1978); *People ex rel. Abeles v. Elrod*, 27 Ill.App.3d 155, 326 N.E.2d 443, 496 (1975). *See also* Comment, *Interstate Extradition: Should the Asylum State Have Unbridled Discretion*, 1980 Brigham Young Univ. L. Rev. 376, 392; Comment, *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 Yale L.J. 97, 112 (1956).

[2] *Hamlet*, Act V, Scene 1, line 186.

[3] The Commonwealth cites a number of cases in a variety of civil cases for the proposition that the universally accepted *Dennison* rule is a "lone historical relic." If *Dennison* were a case in which an individual plaintiff with requisite standing sought to obtain a benefit by forcing a low-level state official to comply with federal law, the Commonwealth might have had a point. Of course, what the Commonwealth overlooks is the constitutionally unique criminal justice context of this case. None of the commerce and due process cases cited by the Commonwealth involve judicial orders to governors of sovereign states that in effect direct them to dispatch police officers to arrest citizens for involuntary transport to a sister state to face criminal charges.

[4] Some of the unqualified statements in Dennison to the effect that federal courts cannot issue writs of mandamus to state officials may have lost their general applicability. The essential holding of the *Dennison* decision, however, is that the

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tive branch decisions that an individual should not be subject to criminal sanctions, regardless of whether relief from criminal liability is based on a decision not to prosecute, a grant of prosecutorial immunity, a grant of executive clemency, or a refusal to extradite. Second, principles of federalism demand great restraint before federal courts attack extradition decisions of state governors. Third, if self-enforcement by the states of the Extradition Clause proves inadequate, the Congress is the proper forum for the development of federal enforcement machinery.

A. Nonintervention By Federal Courts In Extradition Matters Is Supported By Judicial Respect For The Political Branches Of Government In Questions Of Whether To Subject Individual Citizens To Criminal Proceedings.

Under our Constitution, the federal judiciary form an important bulwark for the protection of the individual against the popular will of the majority as expressed by actions of the political branches of government. The Bill of Rights outlines a specific set of rights vested in the individual which the judiciary faithfully applies in cases or controversies notwithstanding the shouts of the Jacobinic crowd.

As Dean Choper has noted, the historic role of this Court in protecting the rights of individuals is not based

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federal judiciary should not invoke its powers of judicial review over the decisions of state governors under the Extradition Clause. This irreducible principle is as valid today as it was in 1861.

on the view that the members of this Court are wiser than officials in other branches of government. The rationale for this Court's role as the guardian of individual liberties is institutional in nature. Because individual liberties are frequently endangered by popular majorities, there is a distinct institutional advantage in placing the guardianship of individual liberties in the hands of life appointed justices who are relatively aloof from the political process and insulated from emotive bursts of popular opinion. J. Choper, *Judicial Review and the National Political Process,* 68 (1980) [hereinafter *Judicial Review*].

When it comes to a decision by politically responsive executive branch officials to relieve an individual from the possibility of criminal sanctions, however, the federal judiciary should defer and has deferred to the political branches of government. While our constitutional scheme presents the federal judiciary with a specific constitutional portfolio to protect the individual from unconstitutional exercise of state power, the nonmajoritarian courts have no role in second-guessing an executive branch decision that one of its citizens should not be forced to undergo criminal prosecution. The rule of judicial non-interference applies to executive branch decisions whether to prosecute an individual, *cf. Imbler v. Pachtman,* 424 U.S. 409, 424 (1976), whether to grant a person immunity or executive clemency, *Ullman v. United States,* 350 U.S. 422, 432-33 (1956) (immunity); *Solesbee v. Balkcom,* 339 U.S. 9, 12 (1950) (executive clemency), and whether an individual should be extradited to another jurisdiction to face criminal charges, *Kentucky v. Dennison,* 66 U.S. (24 How.) 110 (1861).

The decision to subject an individual to criminal prosecution reflects a considered political judgment that the

requirements of public policy demand the sacrifice of the individual for the general good.[5] The reluctance of the federal judiciary to coerce the politically responsive state executive branch to subject one of its citizens to the criminal justice gauntlet of another state is premised on the view that this kind of decision is best left to the majoritarian branches of government.

Puerto Rico's brief ignores this important distinction between protection of individual rights and coercion of other branches of government who decline to act against a citizen. Citing a host of cases where federal courts have used the due process clause and federal substantive law as a shield *to protect* the individual accused of crime, Puerto Rico asks this Court to take the unprecedented step of employing the Extradition Clause as a sword to force a politically responsive branch of government *to act against* an individual.[6]

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[5] *Cf.* O. Holmes, *The Common Law* 41 (1963).

[6] Puerto Rico thus seeks to turn the extradition process away from its historic role as a guardian of individual rights. For years, the extradition process protected persons from discriminatory application of the trial process, threatened civil rights violations—including the ultimate violation of lynching—and poor prison conditions. For instance, in 1937, Governor Harley refused to extradite a black man who escaped from the chain gang in Georgia where newspaper accounts emphasized the poor prison conditions and possibility of lynching. And, in *Commonwealth v. Superintendent of County Prison,* 152 Pa. Super. 167, 31 A.2d 576 (1943), a court refused to allow extradition of a black fugitive where evidence showed that the defendant could not receive a fair trial and was in danger of being lynched. *See* Murphy, *Revising Domestic Extradition Law,* 131 U. Pa. L.Rev. 1063, 1074-75 (1983).

The failure of Puerto Rico to recognize the critical distinction between protecting and impaling an individual is reflected in the Commonwealth's superficial linguistic analysis of Article IV. The Commonwealth appears to believe that the mere presence of the term "shall" in the Extradition Clause is the end of this case, but in fact it is not even the beginning. The fundamental question before this Court is not what the term "shall" means or does not mean, though even this question is not free from doubt.[7]. The linguistic formulation of the issue

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[7] The federal criminal code, for instance, is pockmarked with statutes which declare that "whosoever" engages in various acts "shall" be fined or imprisoned or both. *See, e.g.*, 18 U.S.C. § 111 (maritime assaults); 18 U.S.C. § 152 (false oaths in bankruptcy); 18 U.S.C. § 201 (bribery of federal officials). Certainly the Commonwealth would not contend that a federal court would issue a writ of mandamus to compel federal executive authorities to institute criminal proceedings because of the appearance of the term "shall" in the criminal statutes. If this rule were embraced by the judiciary, every dead-letter criminal statute would be kept alive through extraordinary life-sustaining judicial measures.

Criminal statutes thus do not proscribe prosecutors from declining to proceed against an individual who has in fact committed a crime. This tradition has been applied by state governors, who on occasion have declined to extradite in order to protect individuals from slavery-related prosecutions or to inject "human compassion in extraordinary circumstances." *South Dakota v. Brown*, 144 Cal. Rptr. 758, 576 P.2d 473, 486 (1978) (Mosk, J., dissenting); Murphy, *Revising Domestic Extradition Law*, 131 U. Pa. L. Rev. 1064, 1074-75 (1983). Similar purposes may be served today in disputes involving child custody where there are conflicting state court decrees, efforts to extradite based primarily on debt collection or noncriminal purpose, or extradition of a long time law abiding citizen for a crime occurring years before.

As an alternative method of disposition of this case, this Court could hold that, as a matter of law, the "shall" language in the Extradition Clause operates in a fashion similar to that superficially mandatory language in federal criminal statutes. Under the principles of judicial restraint discussed in Part I of this Brief, however, the respondent believes that the linguistic issue need not be addressed.

begs a more fundamental question, which is whether federal judicial review is an appropriate way to enforce the Extradition Clause under our constitutional scheme. Because the nonmajoritarian courts have no institutionally justifiable role in reviewing extradition actions of state governors that do not impinge on individual liberties, the answer to this question is clearly no.[8]

B. Notions Of Federalism Reinforce Federal Judicial Reluctance To Interfere In Criminal Justice Disputes Between Sovereign States.

Ironically, Puerto Rico cites a number of cases upholding principles of federalism in support of its effort to provoke a federal judicial attack on Governor Branstad. *See* Petitioner's Brief at 18, 31. Federalism concerns, however, strongly suggest that this Court should proceed with caution before it embarks upon a constitutionally unnecessary confrontation with the chief executive of a sovereign state.

In *Younger v. Harris*, 401 U.S. 37 (1971), this Court emphasized the deference that should be afforded to state processes in criminal matters. The Court stressed the notion of:

> . . . 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate State governments, and a continuance in the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

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[8] The refusal of this Court to intervene in extradition matters could be characterized either as a result of lack of jurisdiction or as a voluntary exercise of judicial restraint, or abstention.

401 U.S. at 44. Federal judicial intervention in state criminal processes is appropriate only where the threat to the "individual of irreparable loss" is "immediate and great." *Fenner v. Boykin,* 271 U.S. 240, 243-44 (1926), cited with aproval in *Younger v. Harris,* 401 U.S. at 45-46. This Court has also applied the *Younger* principle in a variety of other contexts. *See Ohio Civil Rights Commission v. Dayton Schools,* 477 U.S. —, 106 S. Ct. 2718 (1985); *Rizzo v. Goode,* 423 U.S. 362 (1976); *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975).

The principles of *Younger v. Harris* apply with full force to extradition proceedings which implicate the same kinds of sovereign interests present in *Younger.* In the context of this case, there is absolutely no showing of "immediate and great" threat of irreparable harm to any individual. As a result, federal judicial review of the decision of the State of Iowa not to expose an individual to criminal sanctions, a decision which reflects "an important aspect of state sovereignty," *cf. Kelly v. Robinson,* 55 U.S.L.W. 4011, 4014 (U.S. Nov. 12, 1976), should not be available. Puerto Rico, if it is unsatisfied with its ability as a territory to obtain fugitives from the sovereign states, should turn to the legislative and executive branches of the federal government for additional enforcement tools.

C. Congress Is The Appropriate Forum To Develop Remedies To Enforce The Extradition Clause Should Self-enforcement Prove Inadequate.

Puerto Rico has attempted to confront this court with a Hobson's choice: either the federal judiciary enforces the "shall" in Article IV, or the provision is meaningless. This assertion, however, is simply not correct. In the first

place, Puerto Rico overlooks the fact that since the founding of the Republic, the extradition process has worked well without intrusive federal court supervision. In addition, Puerto Rico ignores the role of the political branches of the federal government in enforcing extradition.

1. The practical realities of the extradition process provide a check on executive refusal to extradite fugitives.

Puerto Rico claims that interstate discord over extradition occurs "all too often," but cites no empirical support for its vague assertion. Petitioner's Brief at 22-23. Contrary to Puerto Rico's position, the little empirical data that is available indicates that denials of extradition for whatever reason, are uncommon.[9] History thus suggests that the Extradition Clause has successfully prevented the "Balkanization of the Nation," *New York v. O'Neil*, 359 U.S. 1, 8 (1958), as was its design, without federal judicial intervention.

As with most political matters, interstate politics provide an effective check on extradition disputes. A state may be an asylum state on one occasion, but a demanding state on another. Persistent recalcitrance may result in retaliation and can ultimately damage a state's ability to

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[9] *See South Dakota v. Brown*, 144 Cal. Rptr. 758, 576 P.2d 473, 481-82 (1978); Comment, *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 Yale L. J. 97, 100 n.17 (1956).

prosecute its own fugitives. The paucity of extradition conflicts demonstrates that the wheels of the interstate political process in extradition matters are greased by a pattern of cooperation. *See Kentucky v. Dennison*, 65 U.S. (24 How.) at 109.

2. Effective federal enforcement of the Extradition Clause may be obtained through action of the legislative and executive branches of the federal government without requiring a confrontation between the federal judiciary and a state governor.

In addition to the discipline imposed by political reality, the Extradition Clause may be enforced by the Congress and the federal executive branch wholly without thrusting the federal courts into the difficult position of issuing writs of mandamus to the chief executives of sovereign states.

The notion that the political branches of the federal government should be the ultimate arbiters of questions involving the distribution of power in the federal system is hardly novel. As Dean Choper has observed, constitutional questions of federalism differ from those of individual liberty both in terms of their distinctive pragmatic quality and in the likelihood of their fair resolution within the national political chambers. J. Choper, *Judicial Review*, at 203. If the states feel that they are not getting the benefit of the bargain reflected in the Extradition

Clause, they may seek effective and potentially very intrusive relief from Congress.

The potential for effective congressional enforcement of the Extradition Clause is illustrated by the Fugitive Felon Act, 18 U.S.C. § 1073. Through the Fugitive Felon Act, Congress has declared that it is a federal crime to move or travel in interstate commerce to avoid prosecution for a felony. Thus, a fugitive who flees from a jurisdiction to avoid prosecution for a felony, as is alleged in this case, is subject to federal arrest and removal to the jurisdiction where the underlying crime was committed without involving the governor of the asylum state. Once the fleeing felon is removed to the jurisdiction where the crime has been committed in order to face federal charges under the Fugitive Felon Act, the state may regain custody of the felon for local prosecution. The primary purpose of the Fugitive Felon Act was apparently to allow federal law enforcement agents to assist in the search for persons charged with felonies believed to have crossed interstate lines to avoid prosecution. *See e.g. United States v. Thurman*, 687 F.2d 11, 13 (3rd Cir. 1982); *Hemons v. United States*, 163 F.2d 228, 239 (6th Cir. 1947); *United States v. Brandenburg*, 144 F.2d 656, 659 (3rd Cir. 1944).

The Fugitive Felon Act demonstrates that Congress has the power to enforce effectively the Extradition Clause through the federal criminal process. Through the Act, Congress apparently wished to provide states with a measure of federal assistance in securing the return of fugitives. Congress was not willing, however, to authorize federal criminal prosecution for interstate flight in all instances though it plainly had the power to do so as the

ultimate supervisor of the federal system. Instead, the Congress imposed a political check on the initiation of federal criminal proceedings under the Fugitive Felon Act. It required that before a prosecution under the Act could be initiated the action must be formally approved in writing either by the Attorney General or an Assistant Attorney General of the United States. The Congress further provided that the approval function may not be delegated to other subordinates within the Justice Department. *See* 18 U.S.C. § 1073.

The Fugitive Felon Act thus establishes the Attorney General as an important political decisionmaker in determining whether the federal criminal justice apparatus is applied against a fleeing felon. The Attorney General's discretion in determining whether to initiate the federal criminal process is not controlled or limited in any way by the Act.[10]

The Fugitive Felon Act, on the books at all times relevant to this controversy, authorizes the Attorney General or an Assistant Attorney General, in his or her discretion, to charge Ronald Calder with a federal crime, secure his arrest on the federal warrant and return him

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[10] Apparently, the Department of Justice has taken the position that the Fugitive Felon Act is not intended to provide an alternative to state extradition proceedings. *See United States Attorneys' Manual,* Section 9-69.410 (August 1, 1985). This administrative interpretation, not compelled by the language of the Act, reflects a policy of deference to state governors in the extradition process.

Even if the interpretation of the Fugitive Felon Act by the Department of Justice is correct, the general point remains valid, for Congress has the power, even if it is unexercised, to enforce the Extradition Clause through the federal criminal justice process. In light of the availability of this mechanism for providing federal enforcement of extradition, the federal judiciary need not fashion new judicially created remedies.

to Puerto Rico. Puerto Rico may claim that the Fugitive Felon Act, for political or other reasons, has proven inadequate for its needs. The point, however, is not whether the Fugitive Felon Act is adequate to provide Puerto Rico with the relief it seeks in this case, but whether in our federal constitutional scheme Puerto Rico has an nonjudicial avenue to obtain federal assistance in vindicating its claim under the Extradition Clause. Through the Fugitive Felon Act Congress has provided a mechanism to vindicate the criminal justice interests of Puerto Rico in a fashion that does not require the federal courts to engage in unnecessary conflicts with the chief executives of the sovereign states.

The argument of Puerto Rico that this Court is a needed referee in extradition disputes between states is thus not supportable. Congress has appointed a referee, namely, the Attorney General or an Assistant Attorney General, through the Fugitive Felon Act. Given the federalism dimension of the controversy and the strong representation of the states in Congress, particularly in the Senate, the politically responsive branches of government institutionally are better suited to determine the degree of federal involvement required in extradition disputes between states than is the judiciary.[11] *See Garcia v. San Antonio Metropolitan Transit Authority*, — U.S. —, 105 S.Ct. 1005 (1985).

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[11] Puerto Rico, of course, may complain that reliance on Congress to provide remedies for extradition problems is unsatisfactory because Puerto Rico lacks representation in the Congress. Puerto Rico's lack of Congressional representation, of course, is a result of its not being a "state." Because Puerto Rico is not a "state," it is not entitled to invoke the Extradition Clause of Article IV, section 2. See discussion under Part II, *infra*.

The Fugitive Felon Act demonstrates that federal judicial review of the extradition decisions of state governors is unnecessary for the effective preservation of our constitutional scheme. In such circumstances, as Dean Choper has noted, this Court should decline to exercise its authority. J. Choper, *Judicial Review* at 2. Through such abstention, the Court will reduce the friction between the federal judiciary and the majoritarian branches of government and will enhance its ability to render enforceable constitutional decisions when judicial intervention is critically needed, namely, when individual liberties are threatened by majoritarian action. *Id.*

II. BECAUSE PUERTO RICO IS NOT A SOVEREIGN STATE, IT MAY NOT SEEK TO USE THE EXTRADITION CLAUSE AS A SWORD TO ENLIST THE AID OF THE FEDERAL JUDICIARY IN AN UNPRECEDENTED FEDERAL JUDICIAL EFFORT TO COERCE THE POLITICALLY RESPONSIVE BRANCHES OF STATE GOVERNMENT TO EXTRADITE A FUGITIVE.

In a footnote in its brief, the Commonwealth concedes, as it must, that the Extradition Clause applies only to a "State." *See* Petitioner's Brief, pp. 12-13, n.6 The Commonwealth suggests, however, that the framers' choice of words should not be taken literally, but may be expanded to include entities other than states. Puerto Rico in essence urges that Congress, through legislation, has effectively expanded the scope of the constitutional

language by statutorily providing Puerto Rico with a substantial degree of autonomy and independence. *Id.*[12]

The petitioner's argument is unpersuasive. Article IV demonstrates that the framers knew the difference between states of the union and other entities under the direct control of the federal government. Article IV, section 2, cl. 2, which contains the Extradition Clause, uses the term "state." The very next section of Article IV, which vests power in the Congress to regulate land under federal control that is not within the boundaries of a state, employs the term "territory." Art. IV, sec. 3, cl. 2.

The terms "state" and "territory," as used in Article IV, are not synonymous. Congress does not have the power to regulate the states, but only the territory of the United States. Similarly, the Extradition Clause applies only to demands by executive authority of a state. As a result, Puerto Rico cannot invoke the Extradition Clause

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[12] It is true, as Puerto Rico suggests, that the parties did not expressly raise the issue of whether Puerto Rico as a non-state may invoke the Extradition Clause of Article IV. This is not surprising in light of the breadth of *Kentucky v. Dennison*, which was clearly dispositive of all issues presented in Puerto Rico's petition. As a result, it was not necessary to raise any lesser included arguments below. Unlike the lower federal courts, however, this Court has the authority to revise or even overrule *Kentucky v. Dennison*. As a result, alternative arguments are now appropriate.

Puerto Rico does not suggest, nor could it successfully urge, that the issue is not properly before the Court. The question of whether Puerto Rico may avail itself of the Extradition Clause is entirely legal in character, and no concept of deference to state courts would operate to restrain this Court from considering the issue on appeal from the federal Court of Appeals. As a result, the rule in *Illinois v. Gates*, 462 U.S. 213 (1983) has no application.

to require the Governor of Iowa to extradite Calder. *Cf. Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (Puerto Rican statute not "state" statute within 28 U.S.C. § 1254(2)).[13]

Puerto Rico asserts that *Kopel v. Bingham*, 211 U.S. 468 (1909), stands for the proposition that Puerto Rico should be treated as a state for purposes of the Extradition Clause. In *Kopel*, this Court denied a writ of habeas corpus on behalf of a fugitive who was arrested pursuant to a rendition warrant issued by the governor of New York.

The issue in *Kopel*, however, was fundamentally different from the question which the Court confronts today. In *Kopel*, the Court properly held that the executive authorities in Puerto Rico were authorized by a federal statute to make an extradition request to the Governor of a State of the Union. The Court rejected the claim that Puerto Rican officials, in making the request were acting *ultra vires*, because the Congress, through its power to regulate the territories, Article IV, sec. 3, cl. 2, had authorized the Puerto Rican officials to make extradition requests.

In this case, the respondents do not question that Puerto Rican officials are acting within the scope of their

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[13] In *Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572 (1976), this Court dissected a complicated statutory history to determine if Congress intended to include Puerto Rico in the statutory term "state" as it appeared in 28 U.S.C. § 1343(3). After a lengthy survey of the legislative history, the Court, noting that previous statutory provisions had expressly included territories, came to the conclusion that the use of the term "state" in later legislation was not designed to exclude Puerto Rico. *See* 426 U.S. 581-597. The *Flores de Otero* case offers no guidance on the broad constitutional questions presented here.

authority, ultimately derived from the Congress, when they made the extradition requests in this case. If a Governor of Iowa had granted extradition, Ronald Calder would not be able to block extradition in a habeas corpus proceeding on the ground that Puerto Rican officials lacked authority to make the request. *Kopel v. Bingham*, 211 U.S. 468 (1909). The issue presented here, however, is not a statutory question of the scope of power Congress has delegated to officials in Puerto Rico, but rather the entirely different constitutional question of whether Puerto Rico, as a territory, may avail itself of whatever enforcement machinery is available to states under the Extradition Clause. The better view is that the plain meaning of the Constitution as reflected in the deliberate verbal choices of the framers should not be overridden by any apparent exigencies in this or any other case.

Puerto Rico seeks to avoid the plain meaning of the Extradition Clause by presenting itself to this Court as the functional equivalent of a "state." At present, Puerto Rico has a considerable degree of autonomy as a result of Congressional legislation enacted pursuant to its legislative power to regulate territory of the United States. *See Examining Board v. Flores de Otero*, 426 U.S. 572, 594 [illegible]76).

There are a number of important differences, however, between a state of the union and a territory upon which Congress has conferred substantial local authority. The autonomy of Puerto Rico is not guaranteed by the Tenth Amendment or any other constitutional provision from Congressional encroachment, nor is Puerto Rico

locked into the indivisible union through admission to statehood. Puerto Rico thus seeks to extend application of the Extradition Clause to an entity whose political characteristics, unlike that of the states, are not constitutionally established. This proposition would have startled the framers.

In addition, Puerto Rico seeks to force the states to honor its rendition requests even though Congressional representatives of the states have not had an opportunity to consider the admission of Puerto Rico as a state into the Union pursuant to Article IV, section 3, clause 1. Puerto Rico's argument thus not only offends the plain meaning of the Extradition Clause, but serves to eviscerate the significance of the statehood admissions process.

Puerto Rico also observes that the criminal due process rights of all persons in Puerto Rico are protected by the Federal Constitution to the same extent as in any state of the Union. Petitioner's Brief at 13, n. 24. The degree to which constitutional provisions apply to Puerto Rico has been a difficult and controversial question for this Court. *See generally Examining Board v. Flores de Otero*, 426 U.S. at 599 n.30. In *Balzac v. Porto Rico*, 258 U.S. 298 (1922), this Court held that the right to jury trial did not apply in Puerto Rico. While this case has been criticized, *Harris v. Rosario*, 446 U.S. 643, 653 (1980) (Marshall, J., dissenting), it has not been expressly overruled. Indeed, when this Court recently held that the search-and-seizure provisions of the Fourth Amendment applied to criminal proceedings in Puerto Rico, the majority found it necessary to consider the legislative history of Congressional action with respect to Puerto Rico.

See Torres v. Comm. of Puerto Rico, 442 U.S. 656, 470 (1979). This recent decision, supported by prior precedent, *Mullaney v. Anderson*, 342 U.S. 415, 419-420 (1952), stands for the proposition that the applicability of constitutional provisions in Puerto Rico may depend upon Congressional approval or acquiescence. Thus, the states have no direct constitutional guarantee that citizens who are extradited to territories will enjoy the full range of protections that would be available in the courts of a sister state. As a result, the Extradition Clause should not apply to rendition demands by Puerto Rico.

CONCLUSION

This Court should decline Puerto Rico's invitation to thrust the federal judiciary into extradition disputes. Federal judicial review of a decision by a state governor not to force a citizen to face criminal proceedings in a sister state would be an unwarranted intrusion into the political process by the most nonpolitical branch of government. Federal judicial review of extradition decisions by state governors would offend notions of federalism and comity. Furthermore, federal court intervention is not required given the ability of Congress to develop appropriate remedies should the extradition process break down.

In the alternative, this Court may decline to address the main extradition issue and affirm the Court of Appeals on the ground that because Puerto Rico is not a "state," it may not seek the benefits of the Extradition Clause.

For the above reasons, the respondents respectfully pray that the decision of the Court of Appeals in the above-captioned matter be affirmed.

Respectfully submitted,

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